CHAPTER V. GOVERNMENT DEFENSES

Congress has enacted thirteen specific exceptions to government liability under the FTCA.[1] These exceptions apply regardless of state law, and act as jurisdictional bars to suit. Whenever a statutory exception applies, the United States has left intact its sovereign immunity from suit.

A. THE DISCRETIONARY FUNCTION EXCEPTION

Congress has refused to recognize liability "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty."[2] This exception is one of the most litigated provisions of the FTCA. Legislative history concerning the exception is brief. One frequently cited passage notes that the exception was meant to preclude review of regulatory agencies like the Securities and Exchange Commission and Flood Control projects. This exception protects certain government decisions from tort challenge; matters of policy and judgment may not be challenged even if they were negligently or wrongly made. A variety of reasons, including lack of judicial expertise, undue breach of separation of powers, and harm to vital national programs, are cited as rationales for the discretionary function exception.

[1] 28 U.S.C. § 2680 (1994).

[2] 28 U.S.C. § 2680(a) (1994).

Substantial controversy over the discretionary function exception began in the wake of the Supreme Court decision in *Dalehite v. United States*.[3] Over 200 million dollars in claims arose out of the explosion of two ship loads of fertilizer grade ammonium nitrate (FGAN) in the harbor at Texas City, Texas. The FGAN was produced and distributed under control of the United States agricultural aid to foreign countries. The government argued that the discretionary function exception precluded liability. Plaintiffs argued that the tortious conduct occurred during the execution, not during the formulation, of the foreign aid plan. The Supreme Court held for the government: "Where there is room for policy judgment and decision, there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.[4]

Dalehite did not provide an easy test for distinguishing discretionary from nondiscretionary acts; its test sought to distinguish between immune actions at the "planning level" and non-immune actions at the "operational level."[5] Numerous court decisions attempted to cut into the broad government discretion recognized in *Dalehite*.[6] The Supreme Court, however, has since simplified--and broadened--application of the discretionary function exception.

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[3] 346 U.S. 15 (1953).

[4] *Id*. at 36.

[5] *Id*. at 42. *See, e.g.*, Kennewick Irrigation District v. United States, 880 F.2d 1018 (9th Cir. 1989) (whether to line irrigation trench with concrete is discretionary); Starrett v. United States, 847 F.2d 539 (9th Cir. 1988) (failure to develop SOP to preclude ground water pollution from demil operation is operational decision not barred by § 2680(a)); Allen v. United States, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1987) (despite negligence in planning and conducting Nevada Atomic tests, cancer suits barred by § 2680(a)).

[6] Moyer v. Marin Marietta Corp., 481 F.2d 585 (5th Cir. 1973); Seaboard Corp. Coastline R.R. v. United States, 473 F.2d 714 (5th Cir. 1973); American Exchange Bank of Madison v. United States, 257 F.2d 938 (7th Cir. 1958).

In *United States v. Varig Airlines*,[7] and *United States v. Gaubert*,[8] the Court discarded the "operational/planning" level distinction in favor of a new test based on the type of conduct involved. In *Varig Airlines* the Court applied the exception to bar claims based upon the FAA's alleged negligent inspection of commercial aircraft before issuing certifications. The Court noted that it was "unnecessary--and indeed impossible--to define with precision every contour of the discretionary function exception."[9] In an apparent attempt to disassociate itself from the "operational vs. planning level" litmus test developed by the lower courts after *Dalehite*, the Court stated that it was the "nature of the conduct, rather than the status of the actor" that determines whether the discretionary function will apply. The Court reemphasized this test in *Gaubert* when the plaintiff, the president of the savings and loan, alleged that the federal regulators caused him to lose over $100 million in personal funds. The Court found that the exception barred all claims against federal officials who seized and operated a savings and loan.

Encompassed in the discretionary function "conduct" test are the discretionary acts of government agencies acting as regulators of private individuals' conduct. For the acts of individual employees, the basic analytical approach is "whether the challenged acts of a government employee--whatever his or her rank--are of the nature and quality that Congress intended to shield from tort liability." This expanded coverage of the discretionary function exception echoes the statement from *Dalehite* that "where there is room for policy judgment

[7] 467 U.S. 797 (1984).

[8] 499 U.S. 315 (1991).

[9] *Id*.

and decision, there is discretion [and] it necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."[10]

Under the "conduct" test, courts have dismissed suits alleging failure of federal officials to publicize available programs,[11] to supervise properly disposal of water contaminants,[12] to provide adequate police protection after an "invasion,"[13] to warn of death threats by a probationer,[14] and to operate properly failed saving and loan associations.[15] Many, if not all, of these suits would have been allowed under the *Dalehite* operational level analysis.

Several conclusions may be drawn from the many discretionary function cases decided over the years. First, the courts generally find the exception inapplicable, with certain exceptions, to cases sounding in automobile tort,[16] medical malpractice,[17] and pilot or controller negligence in aircraft crashes.[18] By contrast, however, the exception applies to most cases

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[10] Dalehite v. United States, 346 U.S. 15, 36 (1953).

[11] Powers v. United States, 996 F.2d 1121 (11th Cir. 1993).

[12] Kirchman v. United States, 8 F.3d 1273 (8th Cir. 1993).

[13] Industria Panificadora v. United States, 957 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 908 (1992).

[14] Weissich v. United States, 4 F.3d 810 (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

[15] S*ee, e.g.*, McNeily v. United States, 6 F.3d 343 (5th Cir. 1993).

[16] Crouse v. United States, 137 F. Supp. 47 (D. Del. 1955); Sullivan v. United States, 129 F. Supp. 713 (N.D. Ill. 1955).

[17] Baie v. Secretary of Defense, 784 F.2d 1375 (9th Cir. 1986), *cert. denied*, 479 U.S. 823 (1986) (CHAMPUS regulation barring payment for penile insert falls under discretionary function); Supchak v. United States, 365 F.2d 844 (3d Cir. 1966); White v. United States, 317 F.2d 14 (4th Cir. 1963), *aff'd*, 359 F.2d 989 (4th Cir. 1966); United States v. Gray, 199 F.2d 239 (10th Cir. 1952); Denny v. United States, 171 F.2d 365 (5th Cir. 1949), *cert. denied*, 337 U.S. 919 (1949).

[18] Hertz v. United States, 387 F.2d 870 (5th Cir. 1969); United States v. Furumizo, 381 F.2d 965 (9th Cir. 1967); Ingham v. Eastern Airlines Inc., 373 F.2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967); United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964); Kullberg v. United States, 271 F. Supp. 788 (W.D. Pa. 1964).

involving federal regulatory agency actions,[19] and cases involving uniquely military activities.[20] A statute or regulation expressly vesting discretion in the decision maker will usually result in application of the discretionary function exception.[21] Government compliance with mandatory language of a statute or regulation will also normally protect the government.[22] By contrast, the government will often be held liable when a federal employee has violated a mandatory provision of law or regulation.[23]

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[19] Bowman v. United States, 820 F.2d 1393 (4th Cir. 1987) (decision not to place guard rails on Blue Ridge Parkway falls under § 2680(a)); Blaber v. United States, 332 F.2d 629 (2d Cir. 1964); United States v. Morrell, 331 F.2d 498 (10th Cir. 1964), *cert. denied,* 379 U.S. 879 (1964); Weinstein v. United States, 244 F.2d 68 (3d Cir. 1957), *cert. denied,* 355 U.S. 868 (1957).

[20] Blakely v. U.S.S. Iowa, 780 F. Supp. 350 (E.D. Va. 1991), *aff'd,* 991 F.2d 148 (4th Cir. 1993) (holding conduct of Navy investigation within exception); Ayer v. United States, 902 F.2d 1038 (1st Cir. 1990) (design of missile capsule discretionary--need not be made safe for visitors); United States v. Faneca, 332 F.2d 872 (5th Cir. 1964), *cert. denied,* 380 U.S. 971 (1965); Barroll v. United States, 135 F. Supp. 441 (D. Md. 1955); Bartholomae v. United States, 135 F. Supp. 651 (S.D. Cal. 1955), *aff'd on other grounds,* 253 F.2d 716 (9th Cir. 1957).

[21] Layton v. United States, 984 F.2d 1496 (8th Cir. 1993) *cert. denied,* 510 U.S. 877 (1993) (control of federal parks within discretion of park rangers); Arizona Maintenance Co. v. United States, 864 F.2d 1497 (9th Cir. 1989) (seismic blasting by Dept. of Interior must conform to industry standard); Dupree v. United States, 247 F.2d 819 (3d Cir. 1957); Schmidt v. United States, 198 F.2d 32 (7th Cir. 1952).

[22] Gold Turkey Farm v. United States, No. 5-96-22 (D. Minn. 1998) (using the discretionary function exception to bar suit against the United States for noise produced by weapons training); Weinstein v. United States, 244 F.2d 68 (3d Cir. 1957), *cert. denied,* 355 U.S. 868 (1957); Schmidt v. United States, 198 F.2d 32 (7th Cir. 1952), *cert. denied,* 344 U.S. 896 (1952).

[23] Berkovitz v. United States, 486 U.S. 531 (1988) (discretionary function does not apply when polio vaccine released without government mandated testing); Summers v. United States, 905 F.2d 1212 (9th Cir. 1990) (National Forest Services procedures requiring safety not followed on beach fires and warning of their dangers--discretionary function bar unavailable); Dons v. United States, 522 F.2d 990 (6th Cir. 1975); Griffin v. United States, 500 F.2d 1059 (3d Cir. 1974); United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. denied,* 379 U.S. 951 (1964).

B. INTENTIONAL TORTS

One important exception in 28 U.S.C. § 2680 excludes intentional torts for those claims "arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contact rights."[24] A common argument in cases based on intentional torts is that some antecedent negligence was the proximate cause of the injury.[25] A plaintiff, for example, will plead facts alleging that the bodily contact was unintentional or, if it was intentional, simply a consequence of some antecedent negligence.

The courts have generally looked to the underlying basis of the cause of action instead of relying solely on the pleadings in these cases. Actions alleging negligent supervision of a government employee have become common when the claimant is injured by an intentional act.[26] The Supreme Court resolved a conflict among the circuits in these cases in 1988.

Sheridan v. United States
487 U.S. 392 (1988)

Justice Stevens delivered the opinion of the Court.

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[24] 28 U.S.C. § 2680(h) (1994).

[25] *See, e.g.*, Hoesl v. United States, 629 F.2d 586 (9th Cir. 1980); Gibson v. United States, 457 F.2d 1391 (3d Cir. 1972).

[26] Sheehan v. United States, 896 F.2d 1168 (9th Cir. 1990) (sexual assault by fellow employee not barred--supervisor should have intervened); Gay v. United States, 739 F. Supp. 275 (D. Md. 1990) (no negligent hiring or training of health care worker who commits indecent assault on Navy patient); Guccione v. United States, 878 F.2d 32 (2d Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990) (negligent supervision not applicable to assault by FBI undercover agent); Morrill v. United States, 821 F.2d 1426 (9th Cir. 1987) (exception does not bar claim for negligent supervision in rape of "go-go" dancer in EM club); Doe v. United States, 838 F.2d 220 (7th Cir. 1988) (duty to protect day care center children precludes application of exception in sexual molestation case); Hughes v. United States, 662 F.2d 219 (4th Cir. 1981); Naisbitt v. United States, 611 F.2d 1350 (10th Cir. 1980), *cert. denied*, 449 U.S. 885 (1980); Lambertson v. United States, 528 F.2d 441 (2d Cir. 1976), *cert. denied*, 426 U.S. 921 (1976); Bates v. United States, 517 F. Supp. 1350 (W.D. Mo. 1980), *aff'd*, 701 F.2d 737 (8th Cir. 1983); Coffey v. United States, 387 F. Supp. 539 (D. Conn. 1975).

On February 6, 1982, an obviously intoxicated off-duty serviceman named Carr fired several rifle shots into an automobile being driven by petitioners on a public street near the Bethesda Naval Hospital. Petitioners brought suit against the United States alleging that their injuries were caused by the government's negligence in allowing Carr to leave the hospital with a loaded rifle in his possession. The District Court dismissed the action--and the Court of Appeals affirmed--on the ground that the claim is barred by the intentional tort exception to the Federal Tort Claims Act (FTCA). The question we granted certiorari to decide is whether petitioners' claim is one "arising out of" an assault or battery within the meaning of 28 U.S.C. § 2680(h).

I

When it granted the government's motion to dismiss, the District Court accepted the petitioners' version of the facts as alleged in their complaint and as supplemented by discovery. That version may be briefly stated. After finishing his shift as a naval medical aide at the hospital, Carr consumed a large quantity of wine, rum, and other alcoholic beverages. He then packed some of his belongings, including a rifle and ammunition, into a uniform bag and left his quarters. Some time later, three naval corpsmen found him lying face down in a drunken stupor on the concrete floor of a hospital building. They attempted to take him to the emergency room, but he broke away, grabbing the bag and revealing the barrel of the rifle. At the sight of the rifle barrel, the corpsmen fled. They neither took further action to subdue Carr, nor alerted the appropriate authorities that he was heavily intoxicated and brandishing a weapon. Later that evening, Carr fired the shots that caused physical injury to one of the petitioners, and property damage to their car.

The District Court began its legal analysis by noting the general rule that the government is not liable for the intentional torts of its employees. The petitioners argued that the general rule was inapplicable because they were relying, not on the fact that Carr was a government employee when he assaulted them, but rather on the negligence of the other government employees who failed to prevent his use of the rifle. The District Court assumed that the alleged negligence would have made the defendant liable under the law of Maryland, and also assumed that the government would have been liable if Carr had not been a government employee. Nevertheless, although stating that it was "sympathetic" to petitioners' claim, App. to Pet. for Cert. 26a, it concluded that Fourth Circuit precedents required dismissal because Carr "happens to be a government employee rather than a private citizen," *Id*. at 23a.

The Court of Appeal affirmed. Like the District Court, it concluded that the Circuit's prior decisions in *Hughes v. United States*, 662 F.2d 219 (CA4 1981) (*per curiam*), and *Thigpen v. United States*, 800 F.2d 393 (CA4 1986) foreclosed the following argument advanced by petitioners:

> The Sheridans also argue that Carr's status as an enlisted naval man and, therefore, a government employee, should [be] irrelevant to the issue of government liability *vel*

> *non* from liability for negligently failing to prevent the injury. They correctly assert that the shooting at the Sheridan's vehicle was not connected with Carr's job responsibility or duties as a government employee. The Sheridans further assert that if Carr had not been a government employee, a claim would undoubtedly lie against the government and § 2680(h) would be inapplicable. *See Rogers v. United States*, 397 F.2d 12 (4th Cir. 1968) (holding § 2680(h) inapplicable where probationer alleged that negligence by United States marshal allowed nongovernment employee to assault and torture probationers). They contend it is anomalous to deny their claim simply because the corpsmen were negligent in the handling of a government employee rather than a private citizen. 823 F.2d, at 822 (footnotes omitted).

In dissent, Chief Judge Winter argued that cases involving alleged negligence in hiring or supervising government employees are not applicable to a situation in which the basis for the government's alleged liability has nothing to do with the assailant's employment status. He wrote:

> As the majority opinion concedes . . . , *Hughes* and *Thigpen*, as well as other cases relied upon by the majority . . . , are all cases where the purported government negligence was premised solely on claims of negligent hiring and/or supervision. The same was true in *United States v. Shearer*, [473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985)]. Such claims are essentially grounded in the doctrine of respondeat superior. In these cases, the government's liability arises, if at all, <u>only</u> because of the employment relationship. If the assailant were not a federal employee, there would be no independent basis for a suit against the government. It is in this situation that an allegation of government negligence can legitimately be seen as an effort to 'circumvent' the § 2680(h) bar; it is just this situation--where government liability is possible only because of the fortuity that the assailant happens to receive federal paychecks--that § 2680(h) was designed to preclude. *See Shearer*, [473 U.S., at 54-57, 105 S.Ct., at 3041-3043]; *Hughes [v. Sullivan],* 514 F. Supp. [667], at 668' 669-70 [D.C. Va. 1980]; *Panella v. United States*, 216 F.2d 622, 624 (2d Cir. 1954).
>
> On the other hand, where government liability is independent of the assailant's employment status, it is possible to discern two distinct torts: the intentional tort (assault and battery) and the government negligence that precipitated it. Where no reliance is placed on negligent supervision or respondeat superior principles, the cause of action against the government cannot really be said to 'arise out of' the assault and battery; rather it is based on

> the government's breach of a separate legal duty. 823 F.2d at 824 (footnote omitted).

The difference between the majority and the dissent in this case is reflected in conflicting decision among the Circuits as well. We therefore granted certiorari to resolve this important conflict. 484 U.S. 1024 (1988).

II

The Federal Tort Claims Act gives Federal District Courts jurisdiction over claims against the United States for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). However, among other limitations, the Act also provides that this broad grant of jurisdiction "shall not apply to . . . [a]ny claim arising out of assault, battery," or other specified intentional torts. 28 U.S.C. § 2680(h).

The words "any claim arising out of" an assault or battery are unquestionably broad enough to bar all claims based entirely on assault or battery. The import of these words is less clear, however, when they are applied to a claim arising out of two tortious acts, one of which is an assault or battery and the other of which is a mere act of negligence. Nonetheless, it is both settled and undisputed that in at least some situations the fact that an injury was directly caused by an assault or battery will not preclude liability against the government for negligently allowing the assault to occur. Thus, in *United States v. Muniz*, 374 U.S. 50, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963), we held that a prisoner who was assaulted by other inmates could recover damages from the United States because prison officials were negligent in failing to prevent the assault that caused his injury.

Two quite different theories might explain why Muniz' claim did not "arise out of" the assault that caused his injuries. First, it might be assumed that since he alleged an independent basis for tort liability--namely, the negligence of the prison officials--the claim did not arise solely, or even predominantly, out of the assault. Rather the attention of the trier of fact is focused on the government's negligent act or omission; the intentional commission is simply considered as part of the causal link leading to the injury. Under this view, the assailant's individual involvement would not give rise to government liability, but antecedent negligence by government agents could, provided of course that similar negligent conduct would support recovery under the law of the State where the incident occurred. *See* Note, Section 2680(h) of the Federal Tort Claims Act; Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee, 69 Geo.L.J. 803, 922-825 (1981) (advocating this view and collecting cases).

In response to this theory, the Government argues that the "arising out of" language must be read broadly and that the Sheridans' negligence claim is accordingly barred, for in the absence of Carr's assault, there would be no claim. We need not resolve this dispute, however, because even accepting the Government's contention that when an intentional tort is a *sine qua non* of recovery the action "arises out of" that tort, we conclude that the exception does not bar recovery in this case. We thus rely exclusively on the second theory, which makes clear that the intentional tort exception is simply inapplicable to torts that fall outside the scope of § 1346(b)'s general waiver.

This second exception for the *Muniz* holding, which is narrower but not necessarily inconsistent with the first, adopts Judge (later Justice) Harlan's reasoning in *Panella v. United States*. 216 F.2d 622 (CA2 1954). In that case, as in *Muniz*, a prisoner claimed that an assault by another inmate had been caused by the negligence of federal employees. After recognizing that the "immunity against claims arising out of assault and battery can literally be read to apply to assaults committed by persons other than government employees," *Id*. 216 F.2d, at 624, his opinion concluded that § 2680(h) must be read against the rest of the Act. This exception should therefore be construed to apply only to claims that would otherwise be authorized by the basic waiver of sovereign immunity. Since an assault by a person who was not employed by the government could not provide the basis for a claim under the FTCA, the exception could not apply to such an assault; rather, the exception only applies in cases arising out of assaults be federal employees.

In describing the coverage of the FTCA, Judge Harlan emphasized the statutory language that was critical to his analysis. As he explained, the Act covers actions for personal injuries "caused by the negligent or wrongful act or omission of <u>any employee of the Government</u> while acting within the scope of his office or employment . . . (Italics supplied)." *Id*., at 623. We need only move the emphasis to the next phrase--"while acting within the scope of his office or employment"--to apply his analysis to the assault and battery committed by the off-duty, inebriated enlisted man in the case. If nothing more was involved here than the conduct of Carr at the time he shot at petitioners, there would be no basis for imposing liability on the government. The tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does not in itself give rise to government liability whether that conduct is intentional or merely negligent.

As alleged in this case, however, the negligence of other government employees who allowed a foreseeable assault and battery to occur may furnish a basis for government liability that is entirely independent of Carr's employment status. By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the government assumed responsibility to "perform [its] 'good Samaritan' task in a careful manner." *Indian Towing*

Co. v. United States, 350 U.S. 61, 65, 76 S.Ct. 122, 124, 100 L.Ed. 48 (1955). The District Court and the Court of Appeals both assumed that petitioners' version of the facts would support recovery under Maryland law on a negligence theory if the naval hospital had been owned and operated by a private person. Although the government now disputes this assumption, it is not our practice to reexamine a question of state law of that kind, or without good reason, to pass upon it in the first instance. *See Cort v. Ash*, 422 U.S. 66, 73, n.6, 95 S.Ct. 2080, 2085-2086, n.6, 45 L.Ed.2d. 26 (1975). On this assumption, it seems perfectly clear that the mere fact that Carr happened to be an off-duty federal employee should not provide a basis for protecting the government from liability that would attach if Carr had been an unemployed civilian patient or visitor in the hospital. Indeed, in a case in which the employment status of the assailant has nothing to do with the basis for imposing liability on the government, it would seem perverse to exonerate the government because of the happenstance that Carr was on a federal payroll.

In a case of this kind, the fact that Carr's behavior is characterized as an intentional assault rather than a negligent act is also quite irrelevant. If the government has a duty to prevent a foreseeably dangerous individual from wandering about unattended it would be odd to assume that Congress intended a breach of that duty to give rise to liability when the dangerous human instrument was merely negligent but not when he or she was malicious. In fact, the human characteristics of the dangerous instrument are also beside the point. For the theory of liability in this case is analogous to cases in which a person assumes control of a vicious animal, or perhaps an explosive devise. *Cf. Palsgraf v. Long Island R. Co.,* 248 N.Y. 339, 162 N.E. 99 (1928). Because neither Carr's employment status nor his state of mind has any bearing on the basis for petitioner's claim for money damages, intentional tort exception to the FTCA is not applicable in this case.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered. (Footnotes, concurring, and dissenting opinions omitted.)

Criticism of the government's immunity for acts of law enforcement officers led to amendment of the FTCA on March 16, 1974. The amendment made the United States liable for the conduct of "investigative or law enforcement officers of the United States" in claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious

prosecution."[27] This law defines "investigative or law enforcement officers" as officers "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." A significant issue for the military is the scope of the term "law enforcement officer." Even though they do not possess general power to "make arrests for violations of Federal law," military police have been held to be "law enforcement officers of the United States."[28] Post exchange detectives and security guards, although within the definitions of employees of the government, are not federal law enforcement officers within the meaning of the FTCA exception.[29]

Another portion of the intentional tort exception that has generated controversy and, consequently, a morass of litigation, is the misrepresentation provision.[30] This provision encompasses both negligent and intentional misrepresentations. The issue, again, revolves around the distinction between negligent conduct and negligent misrepresentation.[31] The exception applies whenever the alleged negligent act is the making of a false representation.[32] Misrepresentation by omission may, however, be actionable; for example, the weather bureau's

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[27] 28 U.S.C. § 2680(h) (1994).

[28] Kennedy v. United States, 585 F. Supp. 1119 (D.S.C. 1984).

[29] Solomon v. United States, 559 F.2d 309 (5th Cir. 1977), *reh'g denied*, 564 F.2d 98 (5th Cir. 1977).

[30] United States v. Neustadt, 366 U.S. 696 (1961); Jones v. United States, 207 F.2d 563 (2d Cir. 1952), *cert. denied,* 374 U.S. 921 (1954).

[31] *Compare* United States v. Neustadt, 366 U.S. 696 (1961), *with* Block v. Neal, 460 U.S. 289 (1983).

[32] Redmond v. United States, 518 F.2d 811 (7th Cir. 1975); Fitch v. United States, 513 F.2d 1013 (6th Cir. 1975), *cert. denied,* 423 U.S. 866 (1975); Matthews v. United States 456 F.2d 395 (5th Cir. 1972); Reamer v. United States, 459 F.2d 709 (4th Cir. 1972); Saxton v. United States, 456 F.2dd 1105 (8th Cir. 1972); Hall v. United States, 274 F.2d 69 (10th Cir. 1959); Clark v. United States, 218 F.2d 446 (9th Cir. 1954).

negligent failure to give a hurricane warning.[33] Failure to warn of navigational hazards in aircraft cases has been treated as operational negligence and not a misrepresentation.[34] Misdiagnoses in medical malpractice cases are also not considered misrepresentations.[35]

Another clause of the intentional tort exception often invoked by the military is the contract interference clause. This exception bars tort claims arising out of employment contracts or enlisted agreement disputes,[36] but its scope can be limited by the specific facts of a suit.[37]

Although the scope of the intentional tort exception is broad, it does not, however, bar liability of all intentional torts. Several Circuit Courts have allowed suits based on the intentional infliction of emotional distress because it is not one of the specifically enumerated exceptions within the statute.[38] This intentional tort exception generally will apply only if the conduct relied upon to establish the alleged tort is substantially the same as that required to establish one of the specifically barred torts.[39]

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[33] Barite v. United States, 216 F. Supp. 10 (W.D. La. 1963) *aff'd* 326 F.2d 754 (5th Cir. 1964), *cert. denied*, 379 U.S. 852 (1964).

[34] United Airlines, Inc., v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964); Wenzel v. United States, 419 F.2d 260 (3d Cir. 1969).

[35] Ramirez v. United States, 567 F.2d 854 (9th Cir. 1977); Beech v. United States, 345 F.2d 872 (5th Cir. 1965).

[36] Young v. United States, 498 F.2d 1211 (5th Cir. 1974) Reamer v. United States, 459 F.2d 709 (4th Cir. 1972); Small v. United States, 333 F.2d 702 (3d Cir. 1964); Forrester v. United States, 443 F. Supp. 115 (S.D.N.Y. 1978); Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977); Fletcher v. VA, 103 F. Supp. 654 (E.D. Mich. 1952).

[37] *See, e.g.,* Mundy v. United States, 983 F.2d 950 (9th Cir. 1993) (exception does not apply to firing by defense contractor due to withdrawal of security clearance due to FBI misfiling documents).

[38] Truman v. United States, 26 F.3d 592 (5th Cir. 1994); Santiago-Ramirez v. Dep't of Defense, 984 F.2d 16 (1st Cir. 1993); Kohn v. United States, 680 F.2d 922 (2d Cir. 1982), *aff'd*, 760 F.2d 253 (1985); Gross v. United States, 676 F.2d 295 (8th Cir. 1982); Sheehan v. United States, 896 F.2d 1168 (9th Cir. 1990) *modified*, 917 F.2d 424 (9th Cir. 1990).

[39] Sheehan v. United States, 896 F.2d 1168, *modified*, 917 F.2d 424 (9th Cir. 1990).

C. DETENTION OF PROPERTY

No claim under the FTCA arises from the detention of any property by a customs, excise, or law enforcement officer.[40] The language of this exclusion bars claims by both the owner of the detained property and claims in favor of other persons with lesser interests, such as lien holders.[41] Courts have narrowly construed this exception to fit its proper purpose: to preclude law suits which might frustrate vigorous customs and law enforcement. A claim that goods "mysteriously disappeared" from a customs warehouse, therefore, states a valid claim.[42] Money held and lost by the immigration and naturalization service is, however, covered by the exception.[43]

D. COMBATANT ACTIVITIES

The FTCA bars "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."[44] The "combat activities" language refers to

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[40] 28 U.S.C. § 2680(c) (1994).

[41] Menkarell v. Bureau of Narcotics, 463 F.2d 88 (3d Cir. 1972); United States v. One 1951 Cadillac Coupe De Ville, 125 F. Supp. 661 (E.D. Mo. 1954).

[42] Alliance Assurance Co. v. United States, 146 F. Supp. 118 (S.D.N.Y. 1956), *rev'd on other grounds*, 252 F.2d 529 (2d Cir. 1958). *See also* Otten v. United States, 210 F. Supp. 729 (S.D.N.Y. 1962) (official not acting in his capacity as customs, excise, or law enforcement officer).

[43] Halverson v. United States, 972 F.2d 654 (5th Cir. 1992), *cert. denied*, 507 U.S. 925 (1993); *see also* Cheney v. United States, 972 F.2d 247 (8th Cir. 1992) (turning over title of POV to third party who obtains POV from storage warehouse where placed by arrested person falls under exception).

[44] 28 U.S.C. § 2680(j) (1994).

activities closely incident to actual engagement; a formal declaration of war is not required.[45] Training to develop combat skills or other military activity is not within the exception, whether it takes place in peace or in wartime.[46] Quite often the foreign country exception[47] and the incident to service rule will also bar a claim arising out of a combat situation.

E. FOREIGN COUNTRY CLAIMS

The United States has not waived its immunity from suit for claims arising in a "foreign country."[48] The exception applies regardless of the citizenship of the claimant. The dependent of a U.S. service member in Germany must, therefore, resort to other claims statutes to redress government negligence.[49]

A "foreign country" is any land area outside of the control of the United States. The Supreme Court clarified the scope of the exception in 1993 when it applied the foreign country exception to bar the FTCA suit by the widow of a construction worker killed in Antarctica.[50] The Court considered, but rejected, the argument that the exception did not apply to claims arising in Antarctica because there is no sovereign government there. Similar cases have denied

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[45] Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993) (shooting down of Iranian airliner by Navy near Kuwait in July 1988 falls under exception); Rotko v. Abrams, 338 F. Supp. 46 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (1972); Morrison v. United States, 316 F. Supp. 78 (M.D. Ga. 1970).

[46] Johnson v. United States, 170 F.2d 767 (9th Cir. 1948); Skeels v. United States, 72 F. Supp. 372 (W.D. La. 1947).

[47] 28 U.S.C. § 2680(k) (1994).

[48] 28 U.S.C. § 2680(k) (1994).

[49] The Military Claims Act, 10 U.S.C. § 2733, may be used in these situations.

[50] Smith v. United States, 507 U.S. 197 (1993).

FTCA recovery for incidents occurring in United Nations trusteeships,[51] air space over foreign countries,[52] or on the grounds of an American embassy abroad.[53] The foreign country exception does not, however, bar torts occurring on the high seas or in aircraft flying over the high seas.[54] The exception also does not apply when the negligence occurs in the United States but has its effect in a foreign country.[55]

[51] Callas v. United States, 253 F.2d 838 (2d Cir. 1958), *cert. denied,* 357 U.S. 96 (1958).

[52] Pignataro v. United States, 172 F. Supp. 151 (E.D.N.Y. 1959).

[53] Meredith v. United States, 330 F.2d 9 (9th Cir. 1964), *cert. denied,* 379 U.S. 867 (1964).

[54] Blumenthal v. United States, 306 F.2d 16 (3d Cir. 1962). Maritime statutes will usually govern the resolution of the claim in these situations. The suits in the Admiralty Act, 46 U.S.C. §§ 741-752, and the Public Vessel Act, 46 U.S.C. §§ 781-790, are the statutes commonly used. *See* Executive Jet v. Cleveland, 409 U.S. 249 (1972) (requiring a "significant relationship to traditional maritime activity" in maritime suits).

[55] Leaf v. United States, 588 F.2d 733 (9th Cir. 1978); *In re* Paris Air Crash, 399 F. Supp. 732 (C.D. Calif. 1975).